No. 85-1656

Supreme Court, U.S.
FILED
AUG 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

O.L. McCOTTER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner,

V.

GREGORY ALLEN PETTY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether a habeas petitioner who claims that he was denied the effective assistance of counsel must allege how he was prejudiced by counsel's performance.

II. Whether a federal appellate court should consider unexhausted issues raised for the first time on appeal by a habeas petitioner-appellant and remand to allow amendment of the petition to include those issues.

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BRIEF OF PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES O.L. McCotter, Director, Texas Department of Corrections, Petitioner[1] herein, by and through his attorney, the Attorney General of Texas, and files this Brief.

1. For clarity, petitioner in this Court and respondent below, O.L. McCotter, Director, Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Gregory Allen Petty, will be referred to as Petty.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on January 3, 1986, and is attached to the Petition for Writ of Certiorari as Appendix F; the order denying rehearing is attached to the petition as Appendix G. *Petty v. McCotter,* 779 F.2d 299 (5th Cir. 1986). The federal district court's order of dismissal and final judgment are attached as Appendices D and E, and the underlying magistrate's report and recommendation is attached as Appendix C. *Petty v. McKaskle,* No. CA5-84-34 (N.D. Tex.) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on January 3, 1986. A timely filed suggestion for rehearing *en banc* was denied on March 4, 1986. The petition for writ of certiorari was filed within thirty days after final judgment in the court below. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. VI, provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court

lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Title 28 U.S.C. §2244(b) provides as follows:

When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

Rule 41(b), Fed. R. Civ. P., provides as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against he

> plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 2(c), 28 U.S.C. fol. § 2254, provides as follows:

> The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

Rule 4, 28 U.S.C. fol. § 2254, provides as follows:

> The original petition shall be presented promptly to a judge of the district court in accordance with the procedure of the court for the assignment of its business. The petition shall be examined promptly by the judge to whom it is assigned. If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the time period fixed by the court or to take such other action as the judge deems appropriate. In every case a copy of the petition and any order shall be served

by certified mail on the respondent and the attorney general of the state involved.

Rule 5, 28 U.S.C. fol. §2254, provides as follows:

> The answer shall respond to the allegations of the petition. In addition it shall state whether the petitioner has exhauseted his state remedies including any post-conviction remedies available to him under the statutes or procedural rules of the state and including also his right of appeal both from the judgment of conviction and from any adverse judgment or order in the post-conviction proceeding. The answer shall indicate what transcripts (of pretrial, trial, sentencing, and post-conviction proceedings) are available, when they can be furnished, and also what proceedings have been recorded and not transcribed. There shall be attached to the answer such portions of the transcripts as the answering party deems relevant. The court on its own motion or upon request of the peitioner may order that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished. If a transcript is neither available nor procurable, a narrative summary of the evidence may be submitted. If the petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, a copy of the petitioner's brief on appeal and of the opinion of the appellate court, if any, shall also be filed by the respondent with the answer.

Rule 6(a), 28 U.S.C. fol. §2254, provides as follows:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise, If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for a petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

Rule 7(a), 28 U.S.C. fol. §2254, provides as follows:

> If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

Rule 8(a), 28 U.S.C. fol § 2254, provides as follows:

> If the petition is not dismissed at a previous stage in the proceedings, the judge, after the anwer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

Rule 9(b), 28 U.S.C. fol. § 2254, provides as follows:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

STATEMENT OF THE CASE

The state has lawful custody of Petty pursuant to a judgment and sentence of the 99th District Court of Lubbock County, Texas, in Cause No. 19,914, styled *The State of Texas v. Greg Allen Petty.* Petty was charged by indictment with the felony offense of aggravated robbery, to which he entered a plea of not guilty. After a jury trial, Petty was found guilty and his punishment was set at fifty years imprisonment in the Texas Department of Corrections. Sentence was imposed on September 20, 1979. The Texas Court of Criminal Appeals affirmed the conviction on April 17, 1983, in an unpublished *per curiam* opinion. *Petty v. State,* No. 64,750. Petty has filed one state application for writ of habeas corpus pursuant to Tex.

Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1979), and it was denied by the Court of Criminal Appeals on October 5, 1983. *Ex parte Petty,* No. 10,573.

Petty then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Lubbock Division. *Petty v. Procunier,* No. CA5-84-034. The United States Magistrate to whom the case was referred made findings of fact and conclusions of law and recommended that relief be denied. The district court adopted the magistrate's findings and recommendation and on May 14, 1984, ordered the case dismissed.

Petty perfected an appeal to the Court of Appeals for the Fifth Circuit. *Petty v. McCotter,* No. 84-1488. After Petty filed his *pro se* brief and the state filed a brief in response, the court granted Petty's motion for appointment of counsel, and appointed counsel thereafter filed a supplemental brief. The *pro se* brief filed by Petty raised two specific allegations of ineffective assistance of counsel which were not raised in the district court. First, Petty for the first time complained that trial counsel should have investigated why he was missing several teeth at the time of his guilty plea. Second, Petty asserted that trial counsel failed to investigate the possible defense of insanity. (A.F. 3-4).[2] The Fifth Circuit addressed the first of these grounds, finding it to be meritless. (A.F. 4). As to the second allegation, however, the Fifth Circuit remanded. In response to the State's argument that Petty had not alleged specific prejudice, the court held that "*Strickland [v. Washington,* 446 U.S. 668 (1984)] requires that prejudice be proved, not pleaded." (A.F. 5). In the alternative, the court held that Petty should be allowed to amend his petition in the district court to raise his new, unexhausted allegations of ineffective assistance of counsel.

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations,

2. "A." refers to the Joint Appendix. Those portions of the Joint Appendix which are attached as appendices to the Petition for Writ of Certiorari are designated by the following letter, *e.g.,* "F."

> however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

(A.F. 4-5).

The state timely filed a suggestion for rehearing *en banc* raising the two questions presented to this Court, and it was summarily denied. On March 19, 1986, the Fifth Circuit granted the state's motion to stay the mandate to and including April 3, 1986.

On April 3, 1986, the state filed a petition for writ of ceritorari in this Court, following which Petty, through appointed counsel, filed a brief in opposition. On June 30, 1986, the Court granted certiorari.

SUMMARY OF ARGUMENT

The opinion of the court of appeals contains two errors with far-reaching implications. First, that court's interpretation of the pleading requirements of Rule 2(c), 28 U.S.C. fol. § 2254, and *Strickland v. Washington*, 466 U.S. 668 (1984), is in direct conflict with this Court's decision in *Hill v. Lockhart*, _____ U.S. _____, 106 S.Ct. 366 (1985). In holding that a habeas petitioner who pleads ineffective assistance of counsel need not allege specific prejudice, the court of appeals ignored the clear language of *Hill*. Moreover, the court of appeals' holding is at odds with the purpose of Rule 2(c), which is to enable the district courts to "screen" the many habeas petitions filed each year by state prisoners.

Of even greater significance, however, is the Fifth Circuit's radical departure from established appellate procedure in its treatment of the issues Petty raised for the first time on appeal. By remanding to allow Petty to amend his petition to include unexhausted issues raised for the first time in that court, the Fifth Circuit ignored the rule that issues first presented on appeal ordinarily will not be considered. If its opinion is

allowed to stand, it will profoundly affect the manner in which habeas petitions are handled in that circuit. Lacking prescience, the district courts will not be able to foresee what new claims may be raised on appeal. The Fifth Circuit's opinion, by remanding to allow for the inclusion of new issues on appeal, robs the district courts' judgments of their finality. This holding also works unfairly in that it deprives the state of an opportunity to plead abuse of the writ under 28 U.S.C. §2244(b) and Rule 9(b), 28 U.S.C. fol § 2254, in response to either an amended application or a second application filed by Petty.

ARGUMENT

I. BECAUSE PETTY'S APPLICATION FOR WRIT OF HABEAS CORPUS IN THE DISTRICT COURT DID NOT ALLEGE FACTS WHICH, IF TRUE, WOULD ENTITLE HIM TO RELIEF, IT WAS PROPERLY DISMISSED WITHOUT AN EVIDENTIARY HEARING.

A. *Rule 2(c), 28 U.S.C. fol. § 2254, requires a habeas petitioner to support his claims with specific factual allegations.*

"The writ of habeas corpus[3] is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action," *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969), and it is, therefore, accorded "extraordinary prestige." *Fay v. Noia*, 372 U.S. 391, 399 (1963). The scope of the writ is not unlimited, however, nor is its salutary purpose the only factor affecting its reach. *See Kuhlmann v. Wilson*, _____U.S._____, _____, 106 S.Ct. 2616, 2623 (1986). "Rather, the Court has performed its statutory task through a sensitive weighing of the interests implicated by federal habeas corpus adjudication of constitutional claims determined adversely to the prisoner by the state courts." *Id.* at _____, 106 S.Ct. at 2624, citing, *e.g.*, *Engle v. Isaac*, 456 U.S. 107, 126-29 (1982); *Stone v. Powell*, 428 U.S. 465, 489-95 (1976); *Fay v. Noia*, 372 U.S. at 426-34. Thus, for example, *Stone v. Powell* removed from the reach of federal habeas a state prisoner's claim "that

3. 28 U.S.C. §§ 2241, 2254.

evidence obtained in an unconstitutional search or seizure was introduced at this trial" unless the prisoner could show that the State had failed to provide him "an opportunity for full and fair litigation" of his Fourth Amendment claim, the Court being persuaded that any "advance of the legitimate goal of furthering Fourth Amendment rights" through application of the judicially created exclusionary rule on federal habeas is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* at 494.

Similarly, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court found that considerations of finality dictated that a state prisoner's failure to comply with a state's contemporaneous objection rule barred his claim from federal habeas review absent "cause" for the procedural default and resulting "prejudice." *Id.* at 87-91.

Although the Court's approach has been largely to weigh the prisoner's interests against those of the state, other considerations are present. Paramount among these is the immense burden placed on the federal district courts by suits under 28 U.S.C. § 2254. In the statistical year ending June 30, 1985, the federal district courts disposed of 6,872 applications for habeas corpus by state prisoners; another 1,510 applications were disposed of without court action.[4] *Annual Report of the Director*, Administrative Office of the United States Courts (1985); *see Kuhlmann v. Wilson*, _____ U.S. at _____, n.12, 106 S.Ct. at 2625 n.12.

The bulk of the weight of federal habeas litigation necessarily is shouldered by the district courts. "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discre-

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4. This inundation of litigation has been characterized as "progressive trivialization of the writ..." *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring). *See also Kuhlmann v. Wilson*, _____ U.S. at _____ & n.12, 106 S.Ct. at 2625 & n.12; *Schneckloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.CHI.L.REV. 142, 148 (1970); *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L.REV. 392 (1977); Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971).

tion must be left in very large part the administration of federal habeas corpus." *Townsend v. Sain*, 372 U.S. 293, 313 (1963). The habeas rules[5] promulgated by the Court thus contemplate the district courts acting as a "screen" for the many applications filed each year. The rules provide, *inter alia*, that the petition "shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified." Rule 2(c), 28 U.S.C. fol. § 2254.[6]

Rule 2(c) is important because it serves as the initial component of the screening process entrusted to the district courts by the habeas rules. Under Rule 4, 28 U.S.C. fol. § 2254, the district court may summarily dismiss a petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief..." If the district court does not dismiss the petition at this stage, Rule 4 provides that "the judge shall order the respondent to file an answer or other responsive pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate." After the respondent files an answer pursuant to Rule 5, the court then must determine whether to grant summary judgment or to conduct an evidentiary hearing under Rule 8. Summary judgment is appropriate if there is no genuine issue of fact to be resolved and one party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P.; *see Blackledge v. Allison*, 431 U.S. 63, 80-81 (1977). If, however, there are disputed material facts which cannot be resolved on the record, then an evidentiary hearing is required. *Boyd v. Dutton*, 405 U.S. 1, 3 (1972); *Townsend v. Sain*, 372 U.S. at 312-20. In

5. 28 U.S.C. fol. § 2254 (1976).

6. The habeas rules govern suits under 28 U.S.C. § 2254, but the Federal Rules of Civil Procedure "may be applied, when appropriate" to habeas actins so long as they "are not inconsistent" with the habeas rules. Rule 11, 28 U.S.C. fol. § 2254. *See also* Rule 81(a)(2), Fed. R. Civ. P. Although habeas corpus proceedings are characterized as "civil," the label is "gross and inexact" because the writ is "unique." *Harris v. Nelson*, 394 U.S. at 293-94. Thus, the pleading standard of Rule 2(c) differs considerably from that for civil actions generally. Rule 8(a) of the Federal Rules of Civil Procedure requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief..."

deciding whether to hold an evidentiary hearing, the district court necessarily scrutinizes the petitioner's factual allegations, just as it does in its initial review of the petition under Rule 4 to decide whether it whould be summarily dismissed without requiring the respondent to answer. Absent the pleading standard of Rule 2(c), it would be impossible to make either determination.

Although the requirement of factual allegations in habeas cases has been criticized as unjustly harsh when applied to *pro se* litigants,[7] in fact, when balanced by the countervailing rule of *Haines v. Kerner,* 404 U.S. 519 (1972), that *pro se* pleadings are to be liberally construed, the requirement is a fair one. In other words, even though habeas petitioners must support their legal grounds with factual averments, their claims routinely are accorded the most generous of interpretations by federal habeas courts. Only those allegations which, when viewed against the record, are "palpably incredible" or "patently frivolous or false" are subject to summary dismissal. *Blackledge v. Allison,* 431 U.S. at 76, quoting *Machibroda v. United States,* 368 U.S. 487, 495 (1962) and *Herman v. Claudy,* 350 U.S. 116, 119 (1956).

Alleging each element of a claim is critical in habeas practice, however, because there is limited discovery. While under Rule 6(a), 28 U.S.C. fol. § 2254, the district court may grant discovery "in the exercise of his discretion and for good cause shown," in practice, discovery rarely is allowed in federal habeas, both because it is unduly burdensome and because it is largely unnecessary, given the pleading requirements of Rule 2(c). *See Harris v. Nelson,* 394 U.S. at 296. Widespread discovery in habeas cases would thwart the purpose of the writ, which is "to reach all manner of illegal detention [and]...to cut through barriers of form and procedural mazes..." *Id.* at 291. Given limited discovery in habeas cases, the pleadings take on added significance, and the strict application of Rule 2(c) assists the district courts in disposing of the mass of frivolous petitions so that they may more fully consider those few claims

7. *Developments in the Law-Federal Habeas Corpus,* 83 HARV.L.REV. 1038, 1174-75 (1970).

which seem to have some merit.[8] "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris v. Nelson*, 394 U.S. at 300. By summarily disposing of meritless petitions under Rule 2(c), the district courts are able to more fully employ the provisions of Rule 6 (discovery), Rule 7 (expansion of the record) and Rule 8 (evidentiary hearing) in that small minority of cases which raise substantial constitutional issues. *See Blackledge v. Allison*, 431 U.S. at 81-82.

B. *Hill v. Lockhart*, _____ U.S. _____, *106 S.Ct. 366 (1985), requires that a habeas petitioner claiming ineffective assistance of counsel specifically plead prejudice.*

Because the vast majority of federal habeas petitions allege ineffectiveness on the part of trial or appellate counsel,[9] Rule 2(c) is particularly significant as to such claims. *Strickland v. Washington*, 466 U.S. 668 (1984), teaches that a habeas petitioner who alleges that he received the ineffective assistance of counsel has the burden of demonstrating both that counsel's performance was deficient and that the deficient performance prejudiced the defense. In *Hill v. Lockhart*, _____ U.S. _____, 106 S.Ct. 366 (1985), a unanimous Court applied the two-prong test of *Strickland* to ineffective assistance claims in the context of a guilty plea and held that a habeas petitioner who alleges a sixth amendment violation must plead both prongs:

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8. One study shows that 3.2% of habeas petitions filed in the district courts are granted, *Federal Review of State Prisoner Petitions*, Bureau of Justice Special Report, 5 table 13 (March 1984). "The study indicates, however, that the actual success rate for all petitions submitted may be lower than the percentage shown since blatantly defective petitions were sometimes returned directly to the petitioner, and thus were not included in the 'total habeas corpus filings' against which successful petitions were measured." *Id.* at 5-6.

9. "Ineffective-assistance-of-counsel claims are becoming as much a part of state and federal habeas corpus proceedings as the bailiffs' call to order in those courts." *McKaskle v. Vela*, 464 U.S. 1053, 1056 (1984) (O'Connor, J., dissenting to denial of certiorari).

> In the present case the claimed error of counsel is erroneous advice as to eligibility for parole under the sentence agreed to in the plea bargain. We find it unnecessary to determine whether erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner's allegations are insufficient to satisfy the *Strickland v. Washington* requirement of "prejudice." Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no specific circumstances that might support the conclusion the he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.
>
> Because petitioner in this case failed to allege the kind of "prejudice" necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim.

Id. at _____, 106 S.Ct. at 371 (record citation omitted).

The holding of *Hill* is consistent with the rationale of Rule 2(c). *Strickland v. Washington* requires a habeas petitioner to demonstrate both an unprofessional act or omission on the part of counsel and resulting prejudice in order to make out a sixth amendment violation. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. Because a petitioner must prove both prongs of *Strickland* to justify issuance of the writ, it follows that he must plead both prongs in order

to avoid dismissal without a hearing. *Hill v. Lockhart* expressly so holds.[10] Thus, the court of appeals clearly erred in holding that "*Strickland* requires that prejudice be proved, not pleaded." (A.F. 5).

II. BY CONSIDERING UNEXHAUSTED ISSUES RAISED FOR THE FIRST TIME ON APPEAL AND REMANDING TO ALLOW THE HABEAS PETITIONER-APPELLANT TO AMEND HIS PETITION TO INCLUDE THOSE ISSUES, THE OPINION OF THE COURT OF APPEALS UNDERMINES THE FINALITY OF THE DISTRICT COURT'S JUDGMENT AND UNFAIRLY DEPRIVES THE STATE OF AN OPPORTUNITY TO PLEAD ABUSE OF THE WRIT UNDER 28 U.S.C. § 2244(B) AND RULE 9(B), 28 U.S.C. FOL. § 2254.

A. *The Fifth Circuit's disposition of Petty's new claims constitutes a radical departure from settled appellate procedure.*

"The Court of Appeals must look to the statute defining its appellate power, 28 U.S.C. § 2106, for guidance as to the kind of order which it may direct the District Court to enter,"[11] *Bryan v. United States*, 338 U.S. 552, 559 (1950), and whether the disposition in a particular case is authorized by the statute turns on whether it is "just under the circumstances." *Id.* Although the courts of appeals possess broad discretionary power, the courts have fashioned their own limitations on that

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10. The rule of *Hill* is hardly revolutionary. "Mere assertions of ineffective counsel...are not enough. Nor is it sufficient to refer to an act or omission of counsel without indicating why it constituted gross impropriety or prejudicial misconduct." *Bernier v. Moore*, 441 F.2d 395, 396 (1st Cir. 1971).

11. 28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisidiction may affirm, modify, vacate, set aside or reverse any judfment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the netry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

power. Thus, it is a firmly established rule of appellate review that issues raised for the first time on appeal will not be considered. *See* Annot., 76 A.L.R. Fed. 522, 524-25 (1986). There are, of course, exceptions to the rule, most notably where the law has changed, or where legal developments have occurred following the trial which affect the issue in question. *Id.* at 525-26. The Fifth Circuit also will review new issues on appeal which involve purely legal questions[12] where the failure to consider them would result in a miscarriage of justice. *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985); *United States v. Velasquez*, 748 F.2d 972, 973-74 (5th cir. 1984).

The instant case fits into no established exception. While holding that Petty was not required to plead how he was prejudiced by counsel's allegedly deficient representation, the court of appeals also held, in the alternative, that the case should be remanded so that Petty could amend his petition to include the factual allegations made for the first time on appeal as to the manner in which he was prejudiced:

> We are a court of error and ordinarily do not consider issues raised for the first time on appeal. The fact that Petty has now made these allegations, however, indicates that he would raise them in the district court if he were given the opportunity to do so. Therefore, even if a pro se petitioner is required to allege the specific prejudice that he must eventually prove, Petty should be given an opportunity to amend his pleadings in order to assert what he now contends.

(A.F. 4-5).

The new issues raised by Petty on appeal are not based on supervening authority and do not deal with strictly legal issues; instead, they involve intensely factual matters which cannot be resolved without a hearing. Thus, the Fifth Circuit's

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12. A question is purely legal if no facts could have been raised to develop the issue at an evidentiary hearing. *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984); *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n.10 (5th Cir. 1976).

consideration of these matters did not aid in the final disposition of this cause and can in no sense be said to further the orderly administration of justice. Quite to the contrary. Since Petty's new claims have not been presented to the state courts, as required by 28 U.S.C. § 2254(b), (c), amendment of his petition to include them will render it subject to dismissal under *Rose v. Lundy*, 455 U.S. 509 (1982), for failure to exhaust state remedies.[13] The Fifth Circuit's approach works to perpetuate this action in both the state and federal systems. It thus frustrates the screening process entrusted to the district courts by the habeas rules and disserves valid interests in the orderly administration of justice.

> When the process of direct review—which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari—comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Barefoot v. Estelle, 463 U.S. 880, 887 (1983). *See also Kuhlmann v. Wilson*, _____ U.S. at _____, 106 S.Ct. at 2626-27; *Hill v. Lockhart*, _____ U.S. at _____, 106 S.Ct. at 370.

Moreover, the standard employed by the court of appeals creates an exception which swallows the rule and is wholly unworkable. Is it not true that a party who raises new claims in a higher court invariably thus evinces a desire to "raise them in the district court if he were given the opportunity to do so"? Adherence to such a standard can have but one result: evisceration of the proscription against new issues on appeal. The "screening process" envisioned by the federal habeas rules is thus destroyed and the judgments of the district courts are robbed of their finality. In addition, the habeas petitioner is

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13. The Fifth Circuit's opinion opines that "[i]n the interests of efficiency and finality, ... the state may prefer to waive this defense." (A.F. 5). There is nothing in the record to support his statement, and the state assures this Court that is does not and will not waive Petty's non-exhaustion of state remedies.

afforded an unwarranted second opportunity to plead his case. If he is unable to prevail on his initial, conclusory allegations, he need only make additional allegations on appeal in order to obtain a remand with directions to allow him to amend. Clearly, the court of appeals' disposition of Petty's appeal was not "just under the circumstances."

B. *Petty had ample opportunity to amend his petition in the district court.*

Further, to the extent the Fifth Circuit's opinion implies that Petty was not afforded an opportunity to amend his petition, it is factually incorrect. The standard habeas form utilized by Petty in the district court put him on notice that his claims must be supported by factual allegations:

> (6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(A.5).

Petty nonetheless failed to plead any facts which, if true, would establish a violation of the sixth amendment right to counsel. Instead, Petty alleged in only the most conclusory terms that counsel was derelict in failing to interview alibi witnesses (A.11), in conferring with him only once prior to trial (*Id.*) and in failing to advise Petty of the nature of the charge against him (*Id.* at 12).

Even when accorded the liberal construction mandated by *Haines v. Kerner,* 404 U.S. 519 (1972), these allegations are insufficient to withstand a motion for summary judgment. It is firmly established Fifth Circuit law that claims of uncalled witnesses are subject to dismissal where, as here, the witnesses are not named and the nature of their testimony is not set out. *Alexander v. McCotter,* 775 F.2d 595, 602 (5th Cir. 1985); *Boyd v. Estelle,* 661 F.2d 388, 390 (5th Cir. 1981). It is equally well settled that the brevity of an attorney's consultation time with a defendant does not, standing alone, make out a sixth amend-

ment violation. *Mattheson v. King,* 751 F.2d 1432, 1439 (5th Cir. 1985); *Murray v. Maggio,* 736 F.2d 279, 282 (5th Cir. 1984). Thus, Petty's allegation of ineffective assistance of counsel as originally pled in the district court could have been dismissed under Rule 4 without the state being ordered to answer.

The district court nonetheless directed the state to answer. In its responsive pleading, the state explicitly informed Petty that his allegation of a sixth amendment claim was facially deficient:

> Petitioner does not allege what pretrial investigation should have been conducted by counsel that was not conducted or how his defense would have been materially benefitted by any additional investigation by counsel; Petitioner does not allege what witnesses should have been interviewed by counsel that were not, does not allege what those witnesses would have testified to that would have been material to any defense of Petitioner, or that those witnesses would have in fact testified or that their testimony would have been admissible. Petitioner concedes in his petition that counsel did confer with Petitioner to receive a knowledge of the case, but Petitioner does not demonstrate how additional conferences would have benefitted counsel or any defense of Petitioner.

(A. 18).

Despite having the deficiencies in his pleadings directed to his attention, Petty failed to move for leave to amend his petition. Thus, in disposing of Petty's ineffectiveness claim, the magistrate not surprisingly found that it did not allege facts which, if true, would entitle him to relief:

> The first challenge advanced by petitioner is to the effectiveness of the attorney who had been appointed to represent him. Petitioner contends that the performance by the attorney was, at best, perfunctory, that she had conferred with him only one time prior to trial and on that occasion she attempted to persuade him to plead guilty and she was unprepared

> for jury trial, and that she failed to interview prospective defense witnesses.
>
> A habeas corpus petitioner has the burden to demonstrate by sufficient factual allegation and proof an identifiable lapse on the part of counsel as well as some actual adverse impact upon the fairness of his trial which results from that lapse. *Boyd v. Estelle*, 661 F.2d 388 (5th Cir. 1981); *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981). In this case petitioner has not met that burden. Although he contends that the attorney failed to interview prosepective defense witnesses and failed to prepare for trial, he has not identified any witnesses who should have been interviewed by the attorney nor has he identified any trial preparation or investigation which the attorney should have made but failed to do. Further, he has not demonstrated any actual adverse impact upon the fairness of his trial which resulted from those claimed deficiencies.

(A.C. 3).

The magistrate's report also advised Petty of his right to file objections thereto (*Id.* at 8) and admonished that the failure to timely file written objections "shall bar an aggrieved party from attacking the factual findings on appeal" (*Id.*). Petty ignored this second warning that his claims were inadequately pled; he did not object to the magistrate's report or otherwise move to correct the deficiency. Accordingly, the district court denied the writ (A.D. 1) and dismissed the cause (A.E. 1).

C. *The district court's dismissal of Petty's petition was an adjudication on the merits.*

There is no room for dispute as to the propriety of the district court's dismissal of Petty's petition, inasmuch as it fell short of the requirements of Rule 2(c). Indeed, the opinion of the court of appeals implicitly holds as much.

Petty has attempted to characterize the dismissal of his petition by the district court as based on a defect in the pleadings

and, therefore, not a decision on the merits. (Brief in Opposition at 2-3, 5-6). Had the district court summarily dismissed the position as facially inadequate under Rule 4 without requiring the state to answer, Petty's position would be tenable. *See Sanders v. United States*, 373 U.S. 1, 19 (1963). His argument must fail, however, for it ignores the reality of how habeas cases generally, and Petty's in particular, are processed by the district courts. Under Rule 5, 28 U.S.C. fol. § 2254, the state was obliged to furnish the district court with the relevant portions of the record of Petty's trial, appeal and state writ applications. The state did so (A.1), and both the magistrate (A.C. 2) and district court (A.D. 1) reviewed those records in adjudicating Petty's claims.[14] Because the district court considered matters outside the pleadings in concluding that Petty's claims were meritless, its decision denying habeas relief was, in effect, a grant of summary judgment and, hence, on the merits. *Schlang v. Heard*, 691 F.2d 796, 797-98 (5th Cir. 1982); *see Blackledge v. Allison*, 431 U.S. at 80-81.

Moreover, the language of the district court's judgment flatly refutes Petty's argument. Therein, the court "ordered, adjudged and decreed that the application for writ of habeas corpus filed by Gregory Allen Petty be, and it is hereby, denied and dismissed." (A.E. 1) Inasmuch as the court did not specify to the contrary, its dismissal was "an adjudication on the merits." Rule 41(b), Fed. R. Civ. P.; *see* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2373 at 229 (1971).

D. *The result of the decision of the court of appeals is to deny the state the opportunity to plead abuse of the writ under 28 U.S.C. § 2244(b) and Rule 9(b), 28 U.S.C. fol. § 2254.*

It is very significant that the dismissal of Petty's petition was on the merits. Both 28 U.S.C. § 2244(b) and Rule 9(b), 28 U.S.C. fol. § 2244, are designed to preclude vexatious piecemeal litigation of habeas claims and to introduce "a greater finali-

14. Inasmuch as consideration of the state records was necessary to the assessment of Petty's claims, the district court would have committed reversible error had it dismissed the petition without reviewing those records. *Flowers v. Blackburn*, 759 F.2d 1195 (5thCir. 1985).

ty of judgements in habeas corpus proceedings." *See Kuhlmann v. Wilson*, _____ U.S. at _____, 106 S.Ct. at 2622 n.12. Rule 9(b) provides that:

> A second or successive petition may be dismissed if the judge finds that if fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This Court recently adverted to the difference between the two prongs of Section 2244(b) and Rule 9(b), the "successive petition" doctrine and "abuse of the writ." *See Kuhlmann v. Wilson*, _____ U.S. at _____ n. 6, 106 S.Ct. at 2622 n.6. It is the latter situation, abuse of the writ, which is relevant in this case. The claims raised in Petty's application in the district court were reviewed on the merits and rejected by that court. Had the court of appeals followed the normal procedure and refused to consider issues raised for the first time on appeal, it simply would have affirmed the district court's denial of relief. *See, e.g., Smith v. United States Parole Commission*, 752 F.2d 1056, 1057 n.1 (5th Cir. 1985); *Healy v. Maggio*, 706 F.2d 698, 699 (5th Cir. 1983). Thus, in the event of a successive petition raising new claims, the state would have been able to plead abuse of the writ based on the merits review afforded Petty in the instant cause. This is not to say that a such a motion ultimately would succeed, or even that it would be appropriate.[15] Under such a disposition, however, the state

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15. The state believes that Petty's new claim—that his attorney failed to pursue an insanity defense—would be subject to dismissal for abuse of the writ on a subsequent petition under the reasoning of *Woodard v. Hutchins*, 464 U.S. 377, 379-80 (1984) (Powell, J., concurring). The point, however, is that the district courts have considerable discretion in ruling on a motion to dismiss for abuse of the writ. "The principles governing both justifications for denial of a hearing on a successive application are addressed to the sound discretion of the federal trial judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits. Even as to such an application, the federal judge clearly has the power—and, if the ends of justice demand, the duty—to reach the merits." *Sanders v. United States*, 373 U.S. at 18-19.

would have had the option of pleading abuse of the writ in a subsequent proceeding.

By remanding to allow Petty to amend his petition to include allegations first made in the appellate court, the opinion unfairly deprives the state of its abuse defense. Because there has been no appellate review of the judgment of the district court, there is no finality to that court's review on the merits, and thus Petty's amended petition would not be subject to dismissal for abuse.[16]

By the same token, if Petty's amended petition were dismissed for failure to exhaust state remedies, the state would likewise be deprived of its abuse of the writ defense because a dismissal for failure to exhaust state remedies is not an adjudication on the merits. "[*Rose v.*] *Lundy* made plain that assertion of the unexhausted claims necessitates dismissal of the mixed petition and that dismissal of a mixed petition does not create a hurdle of writ abuse on petitioner's return." *Jones v. Estelle*, 722 F.2d 159, 168 (5th Cir. 1983) (en banc), *cert. denied*, 466 U.S. 976 (1984). Thus, although the requirement that the prior adjudication have been on the merits by its terms applies only to "successive petitions" which raise the same grounds, the "abuse of the writ" prong of Section 2244(b) and Rule 9(b) has been held by this Court and the court below to embrace the same requirement. When the court of appeals' decision is considered in light of *Rose v. Lundy*, it effectively abrogates the abuse of the writ doctrine. The end result is that the "equitable" nature of habeas corpus is flouted and state prisoners are allowed to engage in "needless piecemeal litigation...whose only purpose is to vex, harass, or delay." *Sanders v. United States*, 373 U.S. at 18.

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16. There is authority for the application of the abuse doctrine to an amended petition which raises new claims. *See Cody v. Missouri Board of Probation and Parole*, 468 F.Supp. 431, 434-35 (W.D. Mo. 1979). The state does not understand the law of the Fifth Circuit to be consistent with *Cody*, however, and as a practical matter it would be futile to plead abuse in the district court in response to an amended petition explicitly sanctioned by a higher court.

CONCLUSION

For the above reasons, Petitioner requests that the Court reverse the judgment of the court of appeals and affirm the judgment of the district court.

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